

NTSB Order No.
EM-134

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 30th day of June, 1986

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

GLENN SNIDER SIMMONS, Appellant.

Docket ME-120

OPINION AND ORDER

Appellant challenges an October 17, 1985 decision of the Vice Commandant (Appeal No. 2411) affirming the one month suspension of his merchant mariner's license (No. 43431) that Administrative Law Judge Jerry W. Mitchell ordered on July 2, 1984 on finding proved a charge of negligence following an evidentiary hearing.¹ The charge was based on a specification alleging that appellant, while serving under the authority of his mariner's license as operator aboard the M/V American Eagle, and while navigating that vessel on May 20, 1984 in the vicinity of the San Francisco-Oakland Bay Bridge, failed to take adequate precautions to prevent a collision with the S/V Fine Feather, the result of which was the sinking of the latter vessel. On appeal the appellant does not contest the Coast Guard's conclusion that he was guilty of negligence as alleged. Rather, he contends, among other things, that the Coast Guard lacked jurisdiction to suspend his license. For the reasons that follow we will deny the appeal.

The Coast Guard, on the charge sheet issued to appellant, cite 46 U.S.C. 7703, and the regulations promulgated thereunder, as its basis for conducting a hearing to determine whether appellant's license should be suspended or revoked in the event the charge of negligence was found proved. That section specifies, in part, that a license "may be suspended or revoked if, when acting under the authority of [a] license..., the holder ... has committed an act of ... negligence." Although the statute does not define the meaning of the phrase "when acting under the authority of [a] license," a

¹Copies of the decisions of the law judge and the Vice Commandant are attached.

regulation promulgated to implement the statute construes the phrase as follows:

"A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document held by him either when the holding of such license, certificate or document is required by law or regulation or is required in fact as a condition of employment..."²

Appellant, who stipulated that he was required as a condition of his employment on the M/V American Eagle to have an operator's license, argues that the Coast Guard lacked jurisdiction in this proceeding because the Coast Guard's regulation, in his view, improperly delegates to private employers "the power to set the boundaries of the Coast Guard's disciplinary jurisdiction" (Brief at 4). In the alternative, appellant argues that even if such a delegation were lawful, this one would fail for want of standards for the appropriate exercise of the delegated power. We do not believe we are authorized to consider such arguments, for they draw in question the validity of a Coast Guard regulation that is the product of a rulemaking, not a licensing, judgement. We think that where, as here, the basis for the Coast Guard's assertion of the right to suspend or revoke a license is clearly established under the terms of a regulation defining the statutory criterion (i.e. acting under the authority of a license) for determining when the Coast Guard may pursue such action, the assertion of jurisdiction must be sustained unless the regulation is shown to be factually of otherwise inapplicable.

Moreover, even if the Board were empowered to consider appellant's challenge to the Coast Guard regulation, there would be no necessity to do so in this proceeding, for it appears that the Coast Guard has jurisdiction over appellant's license under section 7703 and 46 CFR 5.01-35 without regard to the validity of the "condition of employment" test. The regulation, as noted above, also specifies that a person is acting under the authority of a license "when the holding of such license... is required by law or regulation..."³ As the Vice Commandant pointed out in his decision, the vessel appellant was navigating was required by 46

²46 CFR §5.01-35 (1984).

³Appellant's quotation of the relevant regulation omits, and his discussion of the issue of jurisdiction does not address, this provision of 46 CFR 5.01-35.

USC §8904 to have a licensed operator.⁴ Thus, the Coast Guard had jurisdiction under 46 CFR 5.01-35 without regard to the fact that appellant's employer required that he be licensed.

Appellant next contends that he should be deemed to have constructively served the one-month suspension ordered by the law judge because the Coast Guard refused to allow him to surrender his temporary license unless he withdrew his appeal to the Vice Commandant. We find no merit in appellant's contention.⁵ So far as we are aware, the Coast Guard has no obligation to decide appeals from suspension orders that already have been served and seaman have no right to decide when they will commence service of suspension. In any event, the Coast Guard's refusal to accept the temporary license in no way penalized appellant for having appealed the suspension, it merely gave him the option of foregoing his appeal and serving the suspension immediately or of continuing the appeal with the risk that the suspension, if upheld by the Vice Commandant, might have to be served at a less opportune time. That appellant found neither choice acceptable does not establish that his appeal right had been infringed in any legally cognizable manner.

⁴Appellant asserts that the Vice Commandant's reference to section 8904 was improper because, inter alia, it was not raised at the hearing or cited in the charge sheet. The assertion is without merit. Section 8904 was not "raised" at the hearing because the appellant did not challenge the Coast Guard's jurisdiction until he appealed the law judge's decision to the Vice Commandant. The Coast Guard was not required as a matter of notice to cite in the charge sheet 8904 in addition to 7703 because, among other reasons, the Coast Guard's jurisdiction to suspend or revoke a license for negligence stems from section 7703, not from section 8904. The latter section became relevant only because appellant disputed, after the hearing, the charge sheet's recitation that his alleged negligence had been committed during service under his mariner's license. The Coast Guard was under no obligation to anticipate in the charge sheet every legal objection appellant might subsequently present. The Vice Commandant could properly cite section 8904 as a law supporting jurisdiction under section 7703, and his doing so in no way constituted a change in the Coast Guard's legal theory as to why it believed appellant had been guilty of negligence.

⁵We find no support for appellant's position in his citation of cases which, in a criminal context, proscribe in certain circumstances the imposition of a more severe sentence after the right to an appeal has been exercised. See North Carolina v. Pearce, 395 U.S. 711 (1969).

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied, and
2. The one-month suspension of appellant's license ordered by the law judge and affirmed by the Vice Commandant is affirmed.

GOLDMAN, Acting Chairman, BURNETT, LAUBER and NALL, Members of the Board concurred in the above opinion and order.